

**16-10a-740 Procedure in derivative proceedings.**

- (1) As used in this section:
  - (a) "derivative proceeding" means a civil suit in the right of:
    - (i) a domestic corporation; or
    - (ii) to the extent provided in Subsection (7), a foreign corporation; and
  - (b) "shareholder" includes a beneficial owner whose shares are held:
    - (i) in a voting trust; or
    - (ii) by a nominee on the beneficial owner's behalf.
- (2) A shareholder may not commence or maintain a derivative proceeding unless the shareholder:
  - (a)
    - (i) was a shareholder of the corporation at the time of the act or omission complained of; or
    - (ii) became a shareholder through transfer by operation of law from one who was a shareholder at the time of the act or omission complained of; and
  - (b) fairly and adequately represents the interests of the corporation in enforcing the right of the corporation.
- (3)
  - (a) A shareholder may not commence a derivative proceeding until:
    - (i) a written demand has been made upon the corporation to take suitable action; and
    - (ii) 90 days have expired from the date the demand described in Subsection (3)(a)(i) is made unless:
      - (A) the shareholder is notified before the 90 days have expired that the demand has been rejected by the corporation; or
      - (B) irreparable injury to the corporation would result by waiting for the expiration of the 90-day period.
  - (b) A complaint in a derivative proceeding shall be:
    - (i) verified; and
    - (ii) allege with particularity the demand made to obtain action by the board of directors.
  - (c) A derivative proceeding shall comply with the procedures of Utah Rules of Civil Procedure, Rule 23A.
  - (d) The court shall stay any derivative proceeding until the inquiry is completed and for such additional period as the court considers appropriate if:
    - (i) the corporation commences an inquiry into the allegations made in the demand or complaint; and
    - (ii) a person or group described in Subsection (4) is conducting an active review of the allegations in good faith.
  - (e) If a corporation proposes to dismiss a derivative proceeding pursuant to Subsection (4)(a), discovery by a shareholder following the filing of the derivative proceeding in accordance with this section:
    - (i) shall be limited to facts relating to:
      - (A) whether the person or group described in Subsection (4)(b) or (4)(f) is independent and disinterested;
      - (B) the good faith of the inquiry and review by the person or group described in Subsection (4)(b) or (4)(f); and
      - (C) the reasonableness of the procedures followed by the person or group described in Subsection (4)(b) or (4)(f) in conducting its review; and
    - (ii) may not extend to any facts or substantive matters with respect to the act, omission, or other matter that is the subject matter of the derivative proceeding.
- (4)

- (a) A derivative proceeding shall be dismissed by the court on motion by the corporation if a person or group specified in Subsections (4)(b) or (4)(f) determines in good faith after conducting a reasonable inquiry upon which its conclusions are based that the maintenance of the derivative proceeding is not in the best interests of the corporation.
  - (b) Unless a panel is appointed pursuant to Subsection (4)(f), the determination in Subsection (4) (a) shall be made by:
    - (i) a majority vote of independent directors present at a meeting of the board of directors if the independent directors constitute a quorum; or
    - (ii) a majority vote of a committee consisting of two or more independent directors appointed by a majority vote of independent directors present at a meeting of the board of directors, whether or not such independent directors appointing the committee constituted a quorum.
  - (c) None of the following shall by itself cause a director to be considered not independent for purposes of this section:
    - (i) the nomination or election of the director by persons:
      - (A) who are defendants in the derivative proceeding; or
      - (B) against whom action is demanded;
    - (ii) the naming of the director as:
      - (A) a defendant in the derivative proceeding; or
      - (B) a person against whom action is demanded; or
    - (iii) the approval by the director of the act being challenged in the derivative proceeding or demand if the act resulted in no personal benefit to the director.
  - (d) If a derivative proceeding is commenced after a determination has been made rejecting a demand by a shareholder, the complaint shall allege with particularity facts establishing either:
    - (i) that a majority of the board of directors did not consist of independent directors at the time the determination was made; or
    - (ii) that the requirements of Subsection (4)(a) have not been met.
  - (e)
    - (i) If a majority of the board of directors does not consist of independent directors at the time the determination is made rejecting a demand by a shareholder, the corporation has the burden of proving that the requirements of Subsection (4)(a) have been met.
    - (ii) If a majority of the board of directors consists of independent directors at the time the determination is made rejecting a demand by a shareholder, the plaintiff has the burden of proving that the requirements of Subsection (4)(a) have not been met.
  - (f)
    - (i) The court may appoint a panel of one or more independent persons upon motion by the corporation to make a determination whether the maintenance of the derivative proceeding is in the best interests of the corporation.
    - (ii) If the court appoints a panel under Subsection (4)(f)(i), the plaintiff has the burden of proving that the requirements of Subsection (4)(a) have not been met.
  - (g) A person may appeal from an interlocutory order of a court that grants or denies a motion to dismiss brought pursuant to Subsection (4)(a).
- (5)
- (a) A derivative proceeding may not be discontinued or settled without the court's approval.
  - (b) If the court determines that a proposed discontinuance or settlement will substantially affect the interests of the corporation's shareholders or a class of shareholders, the court shall direct that notice be given to the shareholders affected.
- (6) On termination of the derivative proceeding the court may order:

- (a) the corporation to pay the plaintiff's reasonable expenses, including counsel fees, incurred in the proceeding, if it finds that the proceeding has resulted in a substantial benefit to the corporation;
  - (b) the plaintiff to pay any defendant's reasonable expenses, including counsel fees, incurred in defending the proceeding, if it finds that the proceeding was commenced or maintained:
    - (i) without reasonable cause; or
    - (ii) for an improper purpose; or
  - (c) a party to pay an opposing party's reasonable expenses, including counsel fees, incurred because of the filing of a pleading, motion, or other paper, if it finds that the pleading, motion, or other paper was:
    - (i)
      - (A) not well grounded in fact, after reasonable inquiry; or
      - (B) not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and
    - (ii) interposed for an improper purpose, such as to:
      - (A) harass;
      - (B) cause unnecessary delay; or
      - (C) cause needless increase in the cost of litigation.
- (7)
- (a) In any derivative proceeding in the right of a foreign corporation, the matters covered by this section shall be governed by the laws of the jurisdiction of incorporation of the foreign corporation except for Subsections (3)(c), (3)(d), (5), and (6), which are procedural and not matters relating to the internal affairs of the foreign corporation.
  - (b) In the case of matters relating to a foreign corporation under Subsection (3)(c):
    - (i) references to a person or group described in Subsection (4) are considered to refer to a person or group entitled under the laws of the jurisdiction of incorporation of the foreign corporation to review and dispose of a derivative proceeding; and
    - (ii) the standard of review of a decision by the person or group to dismiss the derivative proceeding is to be governed by the laws of the jurisdiction of incorporation of the foreign corporation.

Amended by Chapter 369, 2012 General Session